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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

On June 14, 2011, Defendant National Air Cargo, Inc.'s Motion to Dismiss Case or, in the alternative, Strike [9] came on for regular calendar before this Court. Having considered all the papers and arguments pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:**

Defendant National Air Cargo, Inc.'s Motion to Dismiss is **GRANTED**.

As a preliminary matter, the Court hereby **GRANTS**

1 Defendant National Air Cargo, Inc.'s ("Defendant")
2 Request for Judicial Notice of Plaintiff Global BTG
3 LLC's ("Plaintiff") articles of organization and the
4 print-out of an internet search for business entities
5 on the California Secretary of State website pursuant
6 to Federal Rule of Evidence 201. Fed. R. Evid. 201. See
7 Phillips v. Bank of Am. Corp., 2011 WL 132861, at *3
8 (N.D. Cal. Jan. 14, 2011)(stating that a court may take
9 judicial notice of matters of public record). However,
10 the Court **DENIES** Defendant's Request for Judicial
11 Notice of the Memorandum of Understanding. Fed. R.
12 Evid. 201.

13 Defendant first moves to dismiss Plaintiff's
14 Complaint on the grounds that Plaintiff lacks standing
15 and capacity to bring this current Action.

16 In order for a plaintiff to have standing to bring
17 a cause of action, it must show that: (1) the plaintiff
18 "has suffered a concrete and particularized injury in
19 fact" which is actual or imminent; (2) the injury is
20 "fairly traceable" to the challenged action of the
21 defendant; and (3) it is likely that "the injury is
22 remediable by appropriate court action." Scott v.
23 Pasadena Unified Sch. Dist., 306 F.3d 646, 654 (9th
24 Cir. 2002).

25 The Court finds that the Complaint pleads
26 sufficient facts to establish that Plaintiff has
27 standing to bring this current Action. Specifically,
28 the Complaint adequately alleges that Plaintiff

1 contracted with Defendant, suffered a concrete and
2 particularized injury in fact that is "fairly
3 traceable" to Defendant's alleged breach of this
4 contract, and that this injury is remediable by the
5 appropriate court action. Id. As such, the Court finds
6 that Plaintiff has sufficiently established it has
7 standing to bring this current Action.

8 However, the Court finds that the Complaint fails
9 to plead sufficient facts to establish that Plaintiff
10 has capacity to bring this current Action. As such,
11 the Court **GRANTS** Defendant's Motion to Dismiss with
12 regard to the issue of capacity. Plaintiff has twenty
13 days with which to amend its Complaint.

14 As a preliminary matter, the Court finds that
15 California law governs the determination of whether
16 Plaintiff has capacity to sue here.¹ Federal Rule of
17 Civil Procedure 17 sets forth the law that is to be
18 applied in determining a party's capacity to sue or be
19 sued. Fed. R. Civ. P. 17(b). Pursuant to Federal Rule
20 of Civil Procedure 17(b), "[t]he capacity of a
21 corporation to sue or be sued shall be determined by
22 the law under which it was organized. In all other
23 cases capacity to sue or be sued shall be determined by

25 ¹ The Parties both rely on New York law here in arguing as
26 to whether Plaintiff has capacity to bring this current Action.
27 While the alleged contract at issue contains a valid New York
28 choice of law provision which governs the substantive claims at
issue in this Action, for the reasons stated in this Order the
Court finds that California law applies to the determination of
Plaintiff's capacity.

1 the law of the state in which the district court is
2 held[.]" Id. Here, Plaintiff is a limited liability
3 company ("LLC"), and not a corporation. While Federal
4 Rule of Civil Procedure 17 is silent with regard to the
5 law that is to be applied in determining the capacity
6 of a LLC, federal courts have noted that the law of the
7 state in which the district court is located should be
8 applied in determining whether a LLC has capacity to
9 sue or be sued. See, e.g., Albers v. Guthy Renker
10 Corp., 92 Fed. Appx. 497 (9th Cir. 2004); Ass'n of
11 Merger Dealers, LLC v. Tosco Corp., 167 F. Supp. 2d 65,
12 71 n. 12 (D.D.C. 2001). As such, the Court finds that
13 California law governs the issue of whether Plaintiff
14 has capacity to bring this current Action.

15 Plaintiff alleges in its Complaint that the Parties
16 entered into the alleged contract at issue in this
17 Action, the Letter of Intent, on July 18, 2010.
18 However, Plaintiff concedes it did not file its
19 articles of organization with the Nevada Secretary of
20 State until July 20, 2010. As such, Plaintiff cannot
21 bring this current Action to enforce the alleged
22 contract unless the Complaint sets forth sufficient
23 facts showing that Plaintiff has capacity to sue here
24 despite the fact it was not a legally registered LLC at
25 the time of contracting. See Fidelity Metals Corp. v.
26 Risley, 77 Cal. App. 2d 377 (1946).

27 Here, Plaintiff asserts that it has capacity to
28 bring this Action because it acted as a *de facto* LLC,

1 the estoppel doctrine applies, and because Plaintiff
2 subsequently adopted or ratified the alleged contract.

3 First, Plaintiff alleges it can bring this Action
4 because it acted as a *de facto* LLC at the time of
5 contracting. In order to establish that Plaintiff
6 acted as a *de facto* LLC, the Complaint must plead
7 sufficient facts to show: (1) the existence of a
8 charter or general law under which an entity may be
9 formed; (2) Plaintiff's good faith attempted compliance
10 with the statute; (3) a colorable compliance with the
11 statutory requirements; and (4) an assumption of the
12 corporate powers. Cooper v. Leslie Salt Co., 70 Cal. 2d
13 627, 634 (1969).

14 The Court finds that the Complaint fails to allege
15 sufficient facts to show that Plaintiff acted as a *de*
16 *facto* LLC at the time of contracting. Specifically,
17 the Complaint merely alleges that Plaintiff negotiated
18 and entered into the alleged contract with Defendant.
19 As such, the Court finds the Complaint fails to set
20 forth sufficient facts at this juncture to show that
21 Plaintiff has capacity to enforce this Action as a *de*
22 *facto* LLC.

23 Next, Plaintiff argues that the estoppel doctrine
24 bars Defendant from asserting that Plaintiff lacks
25 capacity to bring this current Action. The estoppel
26 doctrine is an equitable remedy, and effectively
27 precludes "one who deals with an apparent [entity] ...
28 in such manner as to recognize its corporate existence"

1 from subsequently attempting to get out of a contract
2 by asserting that the corporation or entity lacks
3 capacity. Petersen v. Cloverdale Egg Farms, 161 Cal.
4 App. 2d 792, 798 (1958).

5 The Court finds that the Complaint fails to allege
6 sufficient facts to show that this doctrine applies
7 here. Specifically, the Complaint fails to set forth
8 any facts indicating that at the time of contracting,
9 Defendant had actual knowledge that Plaintiff was not
10 an LLC but chose to deal with Plaintiff as an LLC
11 regardless. See Peacock Hill Ass'n v. Peacock Lagoon
12 Const. Co., 24 Cal. App. 3d 193 (1972). As such,
13 Plaintiff has failed to state sufficient facts to show
14 that this doctrine applies here and precludes Defendant
15 from asserting that Plaintiff lacks capacity to bring
16 this Action.

17 Finally, Plaintiff argues that it has capacity
18 because it subsequently adopted or ratified the alleged
19 contract. In California, "[a] corporation or limited
20 liability company may enforce a contract made on its
21 behalf before the company was formed if the company has
22 adopted the contract or otherwise succeeded to it." 02
23 Development, LLC v. 607 South Park, LLC, 159 Cal. App.
24 4th 609, 612 (2008). The Court finds that Plaintiff
25 fails to sufficiently allege that Plaintiff adopted or
26 ratified the alleged contract. Specifically, the
27 Complaint fails to set forth any facts regarding
28 Plaintiff's alleged adoption or ratification after

1 Plaintiff filed its articles of incorporation on July
2 20, 2010.

3 Therefore, the Court finds that Plaintiff has
4 failed to plead sufficient facts to support a finding
5 at this juncture that it has capacity to bring this
6 current Action to enforce the alleged contract between
7 the Parties. As such, the Court **GRANTS** Defendant's
8 Motion to Dismiss. However, the Court grants Plaintiff
9 twenty days leave to amend as Plaintiff may be able to
10 allege sufficient facts to support a finding that it
11 has capacity to bring this current Action.

12 The Court notes that Plaintiff has pled sufficient
13 facts to state a claim for breach of contract at this
14 stage. Specifically, Plaintiff sufficiently
15 establishes that the alleged contract at issue in this
16 Action is a binding and enforceable contract under New
17 York law. See Teachers Insurance & Annuity Ass'n v.
18 Tribune, 670 F. Supp. 2d 332 (S.D.N.Y. 1987).
19 Moreover, as the Complaint pleads sufficient facts to
20 state a claim for breach of contract, pursuant to the
21 New York Uniform Commercial Code, Plaintiff is entitled
22 to the benefit of its bargain under the alleged
23 contract. See N.Y. U.C.C. § 2A-528. Therefore, the
24 Court notes that Plaintiff has pled sufficient facts to
25 support its claim for \$36,643,816.00 in damages in this
26 Action.

27 However, the Court cautions Plaintiff that the
28 Complaint fails to state a claim for Breach of the

1 Implied Covenant of Good Faith and Fair Dealing at this
2 juncture, as the Complaint fails to sufficiently allege
3 a separate factual basis for the Breach of Contract and
4 Breach of Implied Covenant of Good Faith and Fair
5 Dealing claims. See ICD Holdings S.A. v. Frankel, 976
6 F. Supp. 234, 243-44 (S.D.N.Y. 1997).

7 For the reasons heretofore stated, the Court **GRANTS**
8 Defendant's Motion to Dismiss. Plaintiff has twenty
9 days leave to amend its Complaint with regard to its
10 capacity and its claim for Breach of the Implied
11 Covenant of Good Faith and Fair Dealing. The Court
12 finds that Plaintiff has sufficiently pled its claim
13 for Breach of Contract and its request for damages in
14 this Action.

15
16 **IT IS SO ORDERED.**

17 DATED: June 29 , 2011.

RONALD S.W. LEW

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19 **HONORABLE RONALD S.W. LEW**
Senior, U.S. District Court Judge

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